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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/581,380	06/01/2006	Robertus Martinus M. Diks	F7743(V)	3881
201 7590 01/11/2010 UNILEVER PATENT GROUP 800 SYLVAN AVENUE AG West S. Wing ENGLEWOOD CLIFFS, NJ 07632-3100				
EXAMINER				
SMITH, PRESTON				
ART UNIT		PAPER NUMBER		
1794				
NOTIFICATION DATE		DELIVERY MODE		
01/11/2010		ELECTRONIC		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

patentgroupus@unilever.com

### Office Action Summary

**Application No.**

10/581,380

**Applicant(s)**

DIKS ET AL.

**Examiner**

PRESTON SMITH

**Art Unit**

1794

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 08 September 2009.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-5, 7 and 8 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-5, 7 and 8 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/GS/US)  
Paper No(s)/Mail Date \_\_\_\_\_

- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

## DETAILED ACTION

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

**Claims 1-5,7-8 rejected under 35 U.S.C. 103(a) as being unpatentable over Auriou, WO 02/065859 in view of Naohiro Goto, US-Patent 6,326,050.**

**Regarding claims 1, 4-5,7**, Auriou teaches preparing an emulsified product (dispersion or suspension (page 12, 3<sup>rd</sup> paragraph)) comprising phytosterol dispersed in an aqueous phase, which comprises mixing particulate phytosterol with an aqueous

phase, adding a non-sterol emulsifier having an HLB value of at least 7 to the aqueous phase and/or to a fat phase, and mixing the ingredients together with the aqueous phase and the fat phase to form an emulsion (page 3, 4<sup>th</sup> paragraph). The aqueous phase is maintained at a temperature of between 60-100 C (for at least 5 minutes to 2 hours) and stirred until the phytosterol is evenly dispersed and milk protein may be added (page 12, 3<sup>rd</sup> paragraph). Monoglycerides may be used as an emulsifier (page 13, 3<sup>rd</sup> paragraph). The amount of non-sterol emulsifier may be between 0.01 -1% by weight in the final product (page 8, 4<sup>th</sup> paragraph). POE fatty esters may also be added to the product (page 10, 3<sup>rd</sup> paragraph).

It is unclear if treating the product at a temperature range of 60-100 C (for at least 5 minutes to 2 hours) would be sufficient to sterilize the product and thus it is considered that Auriou fails to explicitly teach a sterilization process which would produce a sterilized product for the embodiment discussed previously (examiner however points out that the emulsion can be used for infant formulas (page 13, last line) which are normally sterilized).

Referring to sterilization, Goto teaches that it was well known in the art to sterilize emulsions having oily and aqueous phases (column 15, lines 35-40). It would have thus been obvious to one having ordinary skill in the art at the time of the invention to sterilize the emulsion of Auriou in order to kill any microbes that may be present in the emulsion.

**Regarding claims 2-3**, Auriou teaches a product made by a very similar method as the embodiment discussed previously wherein the product has a Milk protein content of 0.9 wt% in Table 1 on page 16.

Auriou fails to teach the wt% of milk protein in the described method embodiment of the invention however.

It would have however been obvious to one having ordinary skill in the art at the time of the invention to maintain the milk protein content close to 0.9% in order to maintain the integrity of the invention of Auriou and produce a product with the properties desired by the invention of Auriou. Since producing a product with a similar milk protein amount would have been obvious, it is considered that applicant's claimed range of 0.5-10wt% would have been obvious in light of Auriou.

**Regarding claim 8**, there is no clear teaching in Auriou pertaining to the amount of fat in the emulsion of the described embodiment however Auriou does in fact teach that the amount of fats would vary depending on the type of product desired (page 9, 3<sup>rd</sup> paragraph). Fats in low fat salad dressings may be from 0-10% (page 9, 3<sup>rd</sup> paragraph).

In light of this teaching of Auriou, if one of ordinary skill in the art desired to produce a low fat salad dressing (or food product) product, one of ordinary skill in the art at the time of the invention would have found it obvious to look to this teaching of Auriou and maintain the fat content from 0-10%. In light of Auriou, it is thus considered that the claimed fat range of 0.1 to wt% would have been obvious.

***Response to Arguments***

Applicant's arguments filed 09/08/2009 have been fully considered but they are not persuasive.

Applicant argues that Aurio fails to teach that the aqueous medium is sterilized (see page 4). Goto was used to teach the sterilization process. One cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

Applicant argues that Goto fails to teach the composition of claim 1 (see page 4). Aurio was used to teach the composition (further, Aurio teaches phytoserol see page 3, 4<sup>th</sup> paragraph). One cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning (see page 5), it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge

which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

### ***Conclusion***

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to **PRESTON SMITH** whose telephone number is (571)270-7084. The examiner can normally be reached on Mon-Th 6:00-4:30.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Rena Dye can be reached on (571)272-3186. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Drew E Becker/  
Primary Examiner, Art Unit 1794

prs